

IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES

v.

MANNING, Bradley E., PFC

U.S. Army, (b) (6)

Headquarters and Headquarters Company, U.S.

Army Garrison, Joint Base Myer-Henderson Hall,

Fort Myer, VA 22211

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**DEFENSE REPLY TO
PROSECUTION RESPONSE
TO DEFENSE REQUEST FOR
PARTIAL RECONSIDERATION
OF DISCOVERY RULING**

18 April 2012

RELIEF SOUGHT

1. In accordance with the Rules for Courts-Martial (R.C.M.) 701(a)(2), 701(a)(6), and 905(f), Manual for Courts-Martial (M.C.M.), United States, 2008; Article 46, Uniform Code of Military Justice (UCMJ); and the Fifth and Sixth Amendments to the United States Constitution, the Defense respectfully requests that the Court reconsider, in part, its ruling on the compelled discovery. Specifically, the Defense requests that this Court find that the grand jury materials are in the possession, custody and control of military authorities within the meaning of R.C.M. 701(a)(2) and order them to be produced to the Defense, or for *in camera* review.

BURDEN OF PERSUASION AND BURDEN OF PROOF

2. As the moving party, the Defense has the burden of persuasion. R.C.M. 905(c)(2), 905(f). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1), 905(f).

FACTS

3. In the absence of knowledge to the contrary, the Defense adopts as true the Government's statements about the involvement of various agencies in this case. Thus, there are at least three type of entities involved in this case that are relevant for the purpose of this motion:

- a) Military organizations/entities;
- b) Entities that participated in a joint investigation;
- c) Other "closely aligned" agencies.

Based on the Prosecution's Response to Defense Request for Partial Reconsideration of Discovery Ruling [hereinafter "Government Response"], the Defense has organized these agencies accordingly:

a) Military Organizations/Entities

Army Criminal Investigation Command (CID). The primary law enforcement organization within the Department of the Army focused on investigating the accused.

Defense Intelligence Agency (DIA). An intelligence agency within the DOD which operated the Information Review Task Force (IRTF), a DOD directed organization that “[led] a comprehensive [DOD] review of classified documents posted to the WikiLeaks website [...], and any other associated materials.”

Defense Information Systems Agency (DISA)

United States Central Command (CENTCOM) and United States Southern Command (SOUTHCOM)

b) Joint Investigations

FBI. The primary law enforcement organization within the DOJ, focused on investigating matters related to the accused.

Diplomatic Security Service (DSS). The primary law enforcement organization within the Department of State (DOS), focused on investigating matters related to the DOS.

c) Closely Aligned Organizations

Department of State. The accused is charged with compromising the DOS’s documents and the Government intends to use additional information from the Department during its case-in-chief.

DOJ. The Government collaborated with the federal prosecutors within the DOJ during the accused’s investigation.

Government Agency. The accused is charged with compromising this Government Agency’s documents and the Government intends to use additional information from the Agency during its case-in-chief.

Office of the Director of National Intelligence (ODNI). The Government intends to use information from this Department during its case-in-chief.

ONCIX. The Government disputes that ONCIX is closely aligned. Government Response, p. 5, fn 8. The Court found in its ruling that ONCIX is a closely aligned agency. See Ruling: Defense Motion to Compel Discovery, p. 11, paras. 4, 8.

4. The Government is resisting producing the grand jury testimony under R.C.M. 701(a)(2) on the following basis:

the FBI is a subordinate organization to the DOJ, and neither organization is a DOD agency operating under Title 10 status or subject to a military command. Thus, the FBI and DOJ files are not within the possession, custody, or control of military authorities. RCM 701(a)(2) does not govern discovery of such files, to include any grand jury materials contained therein. Grand jury materials are only discoverable under RCM 701(a)(6) and *Brady*.

Government Response, p. 2.¹

5. Over a month ago, the Defense predicted this latest tactic by the Government to deny discovery:

The Government has not once in the past year and a half objected to any of the Defense's discovery requests on the basis that the information sought is not in the "possession, custody, or control of military authorities." Rather, the Government has simply said that the requests were not specific enough or that it did not believe the material was relevant or necessary under R.C.M. 703. In the event that the Government now switches its "game plan" to deny discovery, it should be estopped from arguing that any of the Defense's requested information is not in the "possession, custody, or control of military authorities."

Reply to the Defense Motion to Compel Discovery, p. 8, fn. 8. Not surprisingly, now that the Government's previous attempts to deny discovery to the Defense have failed, the Government is raising for the first time the argument that the requested files are not within the possession, custody or control of military authorities. The Defense would ask that the Court view with skepticism the *bona fides* of the Government's latest attempt to deny discovery to the Defense. In short, the Government has resisted producing this evidence on various bases: that the request was not specific enough, that there was no adequate basis for the request, that much of the material was classified, etc. *See* Government Response to Defense Motion to Compel Discovery, p. 14. Now that the Government has lost all those battles, it seeks to erect a new obstacle for the Defense: that even though the FBI participated in a joint investigation of the accused and even though the Government has ready access to this material, such material is not in the possession, custody and control of military authorities.

¹ The Defense would point out that the Government's statement is plainly wrong on its face. Even if the materials were not discoverable under R.C.M. 701(a)(2)—which the Defense submits that they are—the materials would be discoverable under R.C.M. 703, and not only under R.C.M. 701(a)(6)/*Brady*. Since the issue here does not turn on the scope of the Government's *Brady* search, but rather on whether the grand jury materials are in the possession, custody and control of military authorities for purposes of R.C.M. 701(a)(2), the Defense will not respond specifically to the Government's outline of what it believes its *Brady* responsibilities to be. The Defense reserves the right, if necessary, to challenge the Government's submissions in this respect at a later time.

ARGUMENT

6. The Government acknowledges that the FBI in this case participated in a joint investigation of the accused. It also acknowledges that the DOJ is closely aligned, in that “The Government collaborated with the federal prosecutors within the DOJ during the accused’s investigation.” *Id.* p. 4. In such circumstances—where the requested discovery is in the possession of an entity that conducted a joint investigation or an entity that is closely aligned with the prosecution—the discovery is deemed to be in the “custody, control, or possession” or military authorities within the meaning of R.C.M. 701(a)(2).

7. R.C.M. 701(a)(2)(A) provides that, upon request of the Defense, the Government shall permit the Defense to inspect:

Any books, papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, *which are within the possession, custody, or control of military authorities*, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial, or were obtained from or belong to the accused.

(emphasis added). The Government believes that because the FBI and the DOJ are organizations not subject to a military command, then the requested materials are not within the possession, custody, or control of military authorities. *See* Government Response, p. 2 (“the FBI is a subordinate organization to the DOJ, and neither organization is a DOD agency operating under Title 10 status or subject to a military command. Thus, the FBI and DOJ files are not within the possession, custody, or control of military authorities.”). The rule does not speak to whether other *organizations* such as the FBI and DOJ are under military control. Rather, it speaks to whether the books, papers, documents, etc. are within the “possession, custody or control” of military authorities. Thus, the Government misses the critical question posed by the rule: *What materials are considered to be in the “custody, possession or control” of military authorities?*²

8. Whether a document is in the “possession, custody or control” of military authorities is a legal question, not a factual one. *See United States v. Santiago*, 46 F.3d 885, 893 (9th Cir. 1995) (“issue involves a legal determination of the meaning of ‘in the possession of the government.’”). What items are legally considered to be in the “possession, custody or control” of military authorities appears to be a question of first impression in military courts.³ However, the issue has arisen in federal courts under Federal Rule of Criminal Procedure 16, the federal court equivalent to R.C.M. 701(a)(2). *See* Drafter’s Analysis, *Manual for Courts–Martial, Rule 701 Discovery* (“(a) Disclosure by the trial counsel. This subsection is based in part on Fed. R. Crim.

² The Government seems to believe that the relevant question is “What are military authorities?” *See* Government Response, p. 3 (“The prosecution proffers that DOD agencies operating under Title 10 status or subject to a military command are ‘military authorities’). No one is disputing what military authorities are; the Defense is arguing that certain material, to include the grand jury transcript, is within the “custody, possession or control” of military authorities within the meaning of R.C.M. 701(a)(2).

³ The Defense suspects that the reason this issue has not been litigated is not because the issue is novel, but because military prosecutors are encouraged not to play games with discovery, and thereby routinely turn over to the Defense all the evidence which the Defense requests and to which the prosecutors have access.

P. 16(a), but it provides for additional matters to be provided to the defense. ... [R.C.M. 701(a)(2)] parallels Fed. R. Crim. P. 16(a)(1)(C) and (D)"); *United States v. Stone*, 40 M.J. 420, 423 n.1. (C.M.A. 1994) (when discussing R.C.M. 701(a)(2), noting that "a similar right to discovery [is] provided in Fed. R. Crim. P. 16..."). Rule 16(a)(1)(C) reads as follows:

Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, *which are within the possession, custody or control of the government*, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at trial, or were obtained from or belong to the defendant.

Fed. R. Crim. P. 16(a)(1)(C)(emphasis added). Thus, the language of the two rules is identical, except that the federal rules use the term "government" instead of "military authorities." The term "government" under Rule 16 is synonymous with "prosecution" or "trial counsel." See *United States v. Brazel*, 102 F.3d 1120, 1150 (11th Cir. 1997) ("Binding precedent has construed the term 'government' in Rule 16(a)(1) to refer to the 'defendant's adversary, the prosecution,' given the 'repeated references to the attorney for the government in 16(a)(1)(A), (B) and (D) and 16(a)(2),' and language in 16(a)(1)(C) referring to papers and documents 'intended for use by the government as evidence in chief at the trial.'"). Thus, under Rule 16, the prosecution has the obligation to turn over specifically requested items in "the government's" (i.e. prosecution's) possession, custody and control. R.C.M. 701(a)(2) is intended to be analogous. See Drafter's Analysis, *Manual for Courts-Martial, Rule 701 Discovery* ("[R.C.M. 701(a)(2)] parallels Fed. R. Crim. P. 16(a)(1)(C) and (D)"). The difference is that R.C.M. 701(a)(2) is intended to be broader than its federal counterpart, in that it requires that the Government turn over not only evidence which is within trial counsel's control, but *also* in the control of military authorities generally.⁴ However, the key under both of these rules is determining when a given item is considered to be within a prosecutor's "custody, possession or control." Since military courts have not addressed this issue directly, federal court precedent is instructive in determining how the phrase "custody, possession or control" under R.C.M. 701(a)(2) should be interpreted.

A. Federal Precedent on the Meaning of "Possession, Custody and Control"

i) Documents are in the "Possession, Custody or Control" of the Government where the Prosecution has Knowledge of, or Access to, the Documents

9. A number of federal courts have accepted that documents are in the "possession, custody or control" of the government for the purposes of Rule 16 where the prosecution had knowledge of, or access to, the documents in question.

10. In *United States v. Libby*, 429 F. Supp. 2d 1 (D.D.C. 2006), for instance, the defendant sought documents that were not in the physical possession of the prosecutor. Rather, they were

⁴ To avoid confusion, it is helpful to read R.C.M. 701(a)(2) as referring to matters within the custody, possession, or control of either trial counsel or military authorities. In this way, it parallels Rule 16, except that it allows for more generous disclosure, in that it includes items within military control as well.

in the physical possession of the White House, more specifically the Office of the Vice President (“OVP”) and/or the CIA. The prosecution resisted producing these documents on the basis that they were not in the custody, possession or control of the government within the meaning of Rule 16:

The Special Counsel, however, posits that his office is not obligated, under Rule 16, to search for discoverable documents in the OVP or at the CIA. With regard to the CIA, the Special Counsel contends that the agency did not participate in the grand jury investigation that led to the indictment in this case, but rather has the “status” of nothing more than a “witness” in the investigation. As such, the Special Counsel avers that the CIA is not aligned with the prosecution. Similarly, the Special Counsel argues that the President’s directive for White House employees to cooperate with the investigation does not align the OVP with the prosecution because the OVP did not join in the investigation, but merely provided responsive documents to the Office of Special Counsel upon request. The Special Counsel also notes that the President’s directive did not provide the Office of Special Counsel with complete access to documents contained in the OVP. Accordingly, the Special Counsel alleges that the documents responsive to the defendant’s requests are not “within the possession, custody, or control of the government” as envisioned by Rule 16.

Id. at 9 (internal citations omitted). The court disagreed, holding that the items were discoverable under Rule 16 because the Special Counsel had knowledge of, and access to, the relevant documents requested by the Defense. The court stated:

The Office of Special Counsel has therefore sought and received a variety of documents from both the OVP and the CIA. It was well aware at the outset of this investigation that both of these entities had documents pertinent to the investigation. Moreover, there can be little doubt that upon the Office of Special Counsel’s requests, there has been a rather free flow of documents to that Office from both the OVP and the CIA, which have then been used to investigate the alleged unauthorized disclosure of classified information and which were used as the basis for obtaining the indictment in this case. These entities have therefore contributed significantly to the investigation, and without their contribution it is unlikely that the indictment in this case would ever have been secured. Thus, this Court concludes that it has been established that the Office of Special Counsel has knowledge of and access to the documents responsive to the defendant’s requests for Rule 16 purposes. Moreover, based upon the nature of the relationship between the Office of Special Counsel and the OVP and the CIA, this Court must conclude that these entities are closely aligned with the prosecution. To hold otherwise, would permit the Office of Special Counsel access to a plethora of documents from the OVP and CIA, which are likely essential to the prosecution of this case, but leave other documents with these entities that are purportedly beyond the Special Counsel’s reach, but which are nonetheless material to the preparation of the defense. Such a result would clearly conflict with the purpose and spirit of the rules governing discovery in criminal cases. Accordingly,

because the Office of Special Counsel has benefitted from the cooperation of the White House [and the CIA], ... he cannot now, in fairness, be permitted to disclaim all responsibility for obtaining Presidential [and CIA] documents that are material to the preparation of the defense.

Id. at 11. Thus, because the government in *Libby* had knowledge of, and access to, the documents in question, it could not then resist producing them to the defendant by claiming that they were not in the possession, custody or control of the government.

11. Similarly, in *United States v. Santiago*, the Ninth Circuit found “no [] requirement” that the agency in technical possession of the documents had to have participated in the investigation of the offense in order for the documents to be considered in the possession, custody or control of the government. *United States v. Santiago*, 46 F.3d 885, 893-94 (9th Cir. 1995). Rather, the *Santiago* court held that because the prosecution had “knowledge of and access to the inmate files held by the Bureau of Prisons” the information was discoverable under Rule 16. *Id.* at 894. The court continued:

Unlike cases in which the government lacked any inkling that the documents at issue existed, the prosecution certainly knew that prison files for the inmate witnesses existed. Moreover, because the government was able to obtain Santiago’s prison file from the Bureau of Prisons, it cannot deny that it also had access to the files of other inmates. As a general matter, the fact that the Bureau of Prisons and the United States Attorney’s Offices are both branches of the Department of Justice would facilitate access by federal prosecutors to prison files.

Id. (internal citations omitted).

12. Likewise, in *United States v. Giffen*, 379 F.Supp.2d 337 (S.D.N.Y. 2004), the defendant sought documents (including classified documents) which were in the possession of aligned agencies, including the CIA and the Department of State. The prosecution resisted producing those documents to the defendant under Rule 16 on the basis that they were not within the prosecutor’s direct control. *Id.* at 342. The court found the prosecution’s position unpersuasive, stating that “documents that the government has reviewed or has access to must be provided to aid a defendant in preparing his defense.” *Id.* at 343. Accordingly, because “[t]he Government acknowledges that it has reviewed documents related to [the defendant] at the CIA and the Department of State during the course of its investigation [] [the defendant] is entitled to review those classified document to assess the viability of a public authority defense.” *Id.* See also *United States v. Poindexter*, 727 F.Supp. 1470, 1478 (D.D.C. 1989)(“In this case, the Independent Counsel has had access in the course of its investigation to extensive quantities of White House documents, including some documents held by the former President and Vice President. He has benefitted from the cooperation of the White House in this area, and he cannot now, in fairness, be permitted to disclaim all responsibility for obtaining Presidential documents that are material to the preparation of the defense”).

13. The policy rationale behind the requirement that Rule 16 be interpreted to cover information that the government has access to or knowledge of is articulated in *United States v. Trevino*, 556 F.2d 1265 (5th Cir. 1977):

Certainly the prosecutor would not be allowed to avoid disclosure of evidence by the simple expedient of leaving relevant evidence to repose in the hands of another agency while utilizing his access to it in preparing his case for trial; such evidence is plainly within his Rule 16 “control.”

Id. at 1272. *See also United States v. Robertson*, 634 F.Supp. 1020, 1025 (E.D. Cal. 1986) (“limiting ‘government’ to the prosecution alone unfairly allows the government access to documents without making them available to the defense.”). In other words, if the rule were read to cover only documents in the technical possession, custody or control of the government, it would create a perverse incentive for prosecutors to “stash away” relevant evidence with aligned or cooperating agencies. *See United States v. Poindexter*, 727 F.Supp. 1470, 1477 (D.D.C. 1989)(“Courts have in the main been more concerned with fairness to the defendant, on the one hand, and the government’s ease of access to the documents sought, on the other, than with the issue whether the documents are actually within the physical possession of the prosecutor.”). Clearly, where the government has knowledge of, or access to, an item specifically requested by the Defense, it cannot evade its discovery obligations by claiming that the evidence is not in its possession, custody or control.

- ii) Documents are in the “Possession, Custody or Control” of the Government where the Documents are held by an Agency that Participated in a Joint Investigation or by an Agency that is Closely Aligned with the Prosecution

14. It is well-established under federal law that documents held by an agency that is jointly investigating the defendant are in the “possession, custody or control” of the government for the purposes of Rule 16. *See e.g. United States v. Upton*, 856 F.Supp. 727, 749-50 (E.D.N.Y.1994) (“The key to the analysis ... is the level of involvement between the United States Attorney’s Office and the other agencies. ... The inquiry is not whether the United States Attorney’s Office physically possesses the discovery material; the inquiry is the extent to which there was a ‘joint investigation’ with another agency.”); *United States v. McDavid*, 2007 WL 926664, *3 (E.D. Cal.) (court held that “materials are subject to [Rule 16] if the prosecutor has knowledge of or access to them or if they are maintained by an agency involved in the investigation.”); *United States v. Johnson*, 2011 WL 4729966, *2 (N.D. Ohio) (“The disclosure requirements [under Rule 16(a)(1)(E)], however, apply not only to the information in the prosecutor’s own files, but also to information held by ‘the law enforcement agency investigating the offense.’”); *United States v. Holihan*, 236 F.Supp.2d 255, 260 (W.D.N.Y. 2002) (“the prosecutor alone is responsible for ensuring that Defendant is provided with information discoverable under Rule 16, including information that is in the possession of other government agencies participating in the investigation.”); *United States v. Microtek International*, 74 F.Supp.2d 1019, 1020 (D. Ore. 1999) (responses to public inquiries are within the control of the government because the Department of Commerce was involved in the investigation of this case); *United States v. Zuno-Arce*, 44 F.3d 1420, 1427 (9th Cir.1995) (prosecutor is “deemed to have knowledge of and

access to anything in the custody or control of any federal agency participating in the same investigation of the defendant.”).

15. It is also well-established that documents that are in the possession of a closely aligned or cooperating agency are deemed to be in the “possession, custody or control” of the government for the purposes of Rule 16. In other words, by virtue of the close relationship between the prosecution and the aligned/cooperating agency, the government has constructive possession, custody or control of the documents. *See, e.g., United States v. Bryant*, 439 F.2d 642, 650 (D.C. Cir. 1971) (tape recording of undercover drug deal with defendant, taken by agents of the Bureau of Narcotics and Dangerous Drugs, was discoverable under Rule 16(a)(1) because “government” may include both the prosecution and an aligned agency); *United States v. NYNEX Corp.*, 781 F.Supp. 19, 25 (D.D.C.1991)(holding that prosecution must produce materials possessed by other federal agencies allied with the prosecution). Thus, where organizations or agencies have engaged in a joint investigation with the prosecution or are closely aligned with the prosecution, the requested items are considered to be in the possession, custody and control of the government within the meaning of Rule 16.

B. Application of Federal Precedent to Interpret “Possession, Custody or Control” in the Instant Case

16. It is clear that under federal law, a prosecutor cannot evade his discovery obligations under the federal equivalent to R.C.M. 701(a)(2) simply by saying that the requested information is not in the possession, custody or control of the government. Instead, the prosecutor is required to either turn over material which: i) he has access to or knowledge of; or ii) is held by agencies that participated in a joint investigation of the accused or by agencies that are closely aligned with the prosecution.

17. In this case, the Government has stated that the “Federal Bureau of Investigation (FBI) ... participated in the joint investigation of the accused.” Government Response, p. 1. Accordingly, any specifically-requested evidence from the FBI’s law enforcement files, including the grand jury transcript, must be turned over under R.C.M. 701(a)(2) as being in the “possession, custody or control” of military authorities.⁵ In fact, the Government has already provided information from the FBI investigation to the Defense in discovery. Thus, the FBI files are clearly in the Government’s possession, custody and control. Why is the Government arbitrarily drawing the line at the grand jury testimony? Why is the grand jury testimony not in the Government’s possession, custody and control, when the other FBI files are?

18. R.C.M. 701(a)(2) must be interpreted to include information that is technically in the hands of a joint investigative agency or any other closely aligned agency. Otherwise, the trial counsel “would [] be allowed to avoid disclosure of evidence by ... leaving relevant evidence to repose in the hands of another agency while utilizing his access to it in preparing his case for trial; such

⁵ The Defense is not clear on exactly which entity, FBI or DOJ, the Government claims is in possession of the grand jury transcript. If the grand jury transcript is within the DOJ, the Court should nonetheless order its production as the DOJ is a closely aligned agency. *See* Government Response, p. 4 (“The prosecution collaborated with the federal prosecutors within the DOJ during the accused’s investigation”).

evidence is plainly within his Rule 16 ‘control.’” *United States v. Trevino*, 556 F.2d 1265, 1272 (5th Cir. 1977). Such is clearly the case with much of the discovery sought by the defense to date, including the grand jury transcript.

19. If R.C.M. 701(a)(2) were not interpreted in line with federal case law, all an Army prosecutor would need to do to evade his R.C.M. 701(a)(2) discovery obligations would be to involve aligned or cooperating agencies in the case and then ensure that these agencies kept the evidence that the prosecutors did not want disclosed in its entirety.⁶ *United States v. Poindexter*, 727 F.Supp. 1470, 1478 (D.D.C. 1989)(“several courts have noted that a prosecutor who has had access to documents in other agencies in the course of his investigation cannot avoid his discovery obligations by selectively leaving the materials with the agency once he has reviewed them.”). This does not comport with the spirit of R.C.M. 701(a)(2), nor the letter of Rule 701(a)(2), properly construed. *See also* Article 46, UCMJ (“The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe.”).

20. Although there is no military case directly on point, the Court of Military Appeals has recognized that evidence outside the physical possession of the military might nonetheless be within the “possession, custody or control of military authorities.” In *United States v. Charles*, 40 M.J. 414 (C.M.A. 1994), the issue turned on whether certain personnel files related to two civilian state police officers should have been disclosed pursuant to either R.C.M. 701(a)(2) or *Brady*. The military judge in that case had denied the defense access to the civilian personnel files after an *in camera* review; the personnel files were then marked as an appellate exhibit, but subsequently lost. On appeal, the Court of Military review analyzed whether the non-disclosure of the (now lost) records under R.C.M. 701(a)(2) denied the accused his right to appellate review. It concluded that it did not and affirmed the conviction. The Court of Military Appeals framed the issue as whether “appellant had the right to appeal a judge’s decision denying the requested records under R.C.M. 701(a)(2)(A) because they were not ‘material to the preparation of the defense’.” *Id.* at. 417. The key, for these purposes, is that both the Court of Military Review and the Court of Military Appeals considered the discoverability of civilian police officer personnel files under R.C.M. 701(a)(2)(A). Clearly, the personnel records of state police officers are not technically in the possession, custody or control of military authorities. State police officers are not, in the Government’s words, operating under Title 10 status or subject to a military command. However, given what was (presumably) some close alignment between the state police and the military authorities in this particular case, these records were properly considered under the R.C.M. 701(a)(2) standard. *See also United States v. Williams*, 2005 WL 3215323 (2005)(unpublished)(in response to a defense discovery request for U.S. customs documents in a case where charges stemmed from wrongful importation of a drug, the court referenced R.C.M. 701(a)(2); while the court ultimately denied discovery, noting that the requested documents would have no effect on resolution of the relevant issues, the court did not state that such customs documents were not in the possession, custody or control of military authorities). Military courts thus recognize that discovery obligations under R.C.M. 701(a)(2) are broader than what may physically be in the possession, custody or control of military authorities.

⁶ The Defense recognizes, of course, that the Government would still have an obligation under *Brady* to produce favorable evidence.

21. R.C.M. 701(a)(2) must be read consistently with federal case law to include documents that are maintained or held by agencies that are jointly investigating the accused or agencies that are closely aligned with the prosecution. If it were not so read, then defendants in federal cases would benefit from much broader discovery rights than their military counterparts, as those defendants would have access under Rule 16(a)(1)(C) to documents of agencies involved in joint investigations or agencies that are closely aligned with the prosecution, while military accuseds would not. This, in turn, could not be reconciled with the repeated statements of military courts that military discovery is much broader than that available in civilian courts. See *United States v. Hart*, 29 M.J. 407, 410 (C.M.A. 1990) (“[D]iscovery available to the accused in courts-martial is broader than the discovery rights granted to most civilian defendants.”); *United States v. Guthrie*, 53 M.J. 103, 105 (C.A.A.F. 2000) (“Discovery in military practice is open, broad, liberal, and generous.”); *United States v. Simmons*, 38 M.J. 376, 380 (C.M.A. 1993) (“Congress intended more generous discovery to be available for military accused.”); *United States v. Killebrew*, 9 M.J. 154, 159 (C.M.A. 1980) (“Military law has long been more liberal than its civilian counterpart in disclosing the government’s case to the accused and in granting discovery rights.”); *United States v. Adens*, 56 M.J. 724, 731 (A. Ct. Crim. App. 2002) (“The military criminal justice system contains much broader rights of discovery than is available under the Constitution or in most civilian jurisdictions.”).

CONCLUSION

22. In accordance with the above, the Defense requests that the Court order the entire grand jury proceedings in relation to PFC Manning or Wikileaks to be produced to the Defense, or alternatively, that it be produced for *in camera* review to determine whether the evidence is discoverable under R.C.M. 701(a)(2) as being material to the preparation of the defense. If the Court concludes that grand jury testimony is not within the possession, custody or control of military authorities, the Defense still requests that the Court order production of the entire grand jury investigation under the “relevant and necessary” standard under R.C.M. 703.

Respectfully submitted,

DAVID EDWARD COOMBS
Civilian Defense Counsel